

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODNEY D. JOHNSON

Claimant

VS.

J & J BMAR JOINT VENTURES LLP

Respondent

AND

**COMMERCE & INDUSTRY INSURANCE
CO.**

Insurance Carrier

Docket No. 1,012,089

ORDER

Claimant requests review of the September 14, 2005 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found that claimant was injured in a non-compensable incident of horseplay and denied the medical treatment requested by claimant.

Claimant requests review of the ALJ's finding that claimant's injury was the result of horseplay. Claimant contends that, instead, his injury was the result of an assault by a co-worker that arose out of an incident or condition of the work place. Claimant argues that the facts of this incident fall within the exception for assaults created by the Kansas Supreme Court in *Brannum*.¹

Respondent and its insurance carrier (respondent) argue that claimant's version of events is not credible and, therefore, denial of medical treatment was appropriate. Respondent further argued that assuming claimant was struck by his co-worker, such an assault did not arise out of and in the course of his employment with respondent. In the

¹*Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969).

alternative, if the Board vacates the ALJ's denial of compensation, respondent requests that the matter be remanded to the ALJ because the ALJ erroneously excluded evidence offered by respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is an electrician working full time for respondent. Claimant testified that at about 3 p.m. on July 8, 2003, he was called into the office by his supervisor, Jake Kosac, to make schedules and order parts. Claimant stated that as he was sitting on the corner of the desk looking over some documents, he was struck in the chest by Mr. Kosac. Claimant lost his balance and, as he was falling off the desk, grabbed the corner of the desk and the door, catching himself before he fell to the floor. Claimant and Mr. Kosac were not arguing at the time but were talking about job assignments. Another employee, Gordon Winkliman, was in the office when the incident occurred but did not witness claimant being hit by Mr. Kosac. Claimant testified that Mr. Kosac was sitting when he struck claimant, and the punch was not a full-force blow. Claimant stated that it was not the punch itself that injured him but the twisting from the fall off the desk.

Claimant stated that after the fall, he felt immediate onset of back pain. He continued to work the rest of the day and reported the incident to respondent's safety manager the next day. Respondent sent claimant to Geary Occupational Health, and he was seen by Dr. Bryan S. Van Meter two days after the incident. Dr. Van Meter diagnosed claimant with a thoracic and cervical muscle strain. Dr. Van Meter again saw the claimant on July 16, 2003, when respondent requested he determine if claimant's injury was work related. Dr. Van Meter stated he found it difficult to believe that claimant was having "this extensive back pain from a fall from a 2 1/2 foot height to the floor when he states he did not fall, he actually caught himself with his arm" ² Dr. Van Meter opined that claimant did not have a work-related injury, discharged him from treatment and returned him to work with no restrictions.

Claimant was seen by Dr. Gary Petry on November 4, 2003. Dr. Petry opined that claimant's complaints were caused by the punch in the chest and subsequent fall, which exacerbated a prior back injury.

Thereafter, claimant was sent by his attorney to Dr. Sergio Delgado, who likewise attributed claimant's symptoms to the July 8, 2003, incident.

²P.H. Trans., Resp. Ex. D at 2.

Claimant testified that he had never had any arguments with Mr. Kosac and that the incident on July 8, 2003, was the first time Mr. Kosac had ever hit him. But he said Mr. Kosac had a history of hitting employees and named six other employees of respondent who had been struck by Mr. Kosac. He did not think any of those other incidents were reported to Mr. Kosac's supervisors. One of those named, Patrick Nicholson, testified concerning an incident where Mr. Kosac struck him in the chest with a stapler. Mr. Nicholson testified that in his opinion, Mr. Kosac was not being playful, and he had no warning that he was going to be hit. Mr. Nicholson stated that although he had a light coat on at the time, his skin was penetrated by a staple. He did not report this incident to anyone.

Respondent introduced into evidence a written, unsworn statement from Mr. Winkliman to the effect that he had never seen Mr. Kosac hit anyone on the job. Respondent attempted to introduce into evidence an unsworn statement by Mr. Kosac. Claimant objected on the basis of hearsay, indicating that Mr. Kosac was deceased. Respondent argued that Kansas has an exception to the hearsay rule if a witness is not able to testify. The ALJ refused to allow the statement into evidence. Respondent argues this was error, as hearsay is admissible in Workers Compensation proceedings.³ Furthermore, written statements made by declarants who are unavailable to testify are excepted from the hearsay rule.⁴ However, the Board does not reach this question, as evidentiary rulings made by an ALJ are not appealable from a preliminary hearing.⁵ At this stage of the proceedings, the Board is without jurisdiction to review that finding.

On appeal, the threshold question is whether, under the facts and circumstances of this case, the injuries sustained by claimant at work from either horseplay or an assault and battery by a co-worker are compensable. Fights between co-workers usually do not arise out of employment and generally will not be compensable.⁶ If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.⁷ For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,⁸ or the employer had reason to anticipate that

³K.S.A. 2004 Supp. 44-523(a) and K.A.R. 51-3-8(c).

⁴K.S.A. 60-460(d).

⁵K.S.A. 44-534a(a)(2) and K.S.A. 2004 Supp. 44-551(b)(2)(A).

⁶*Addington v. Hall*, 160 Kan. 268, 272-73, 160 P.2d 649 (1945).

⁷See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

⁸*Baggett v. B & G Construction*, 21 Kan. App. 2d 347, Syl. ¶ 2, 900 P.2d 857 (1995).

injury would result if the co-workers continued to work together.⁹ Neither of these conditions has been established in this case. There was no particular condition or hazard that exacerbated claimant's injury. And there has been no showing that respondent was aware of any problem between claimant and his supervisor or that it was foreseeable that this incident would occur.

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.¹⁰ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹¹

K.S.A. 44-501(a) states, in part:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Arising "out of" the employment is defined as follows:

An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.¹²

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.¹³ No such connection has been established here.

⁹ *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, Syl. ¶ 2, 909 P.2d 657 (1995).

¹⁰ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

¹¹ *Supra* note 7 at 502.

¹² *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹³ *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 3, 428 P.2d 825 (1967).

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer, then injuries suffered in such activities are compensable.¹⁴

The Board finds there was no causal connection between the accidental injury and claimant's employment with respondent. Whether the injury occurred as a result of an assault or from horseplay, it is not compensable.

In his Order denying benefits, the ALJ cited the Board's Order in *Coleman*.¹⁵ In that case, the Board quoted *Harris*¹⁶ for the proposition that

if an employee is assaulted by a fellow workman, **whether in anger or in play**, an injury so sustained does not arise "out of employment" . . . unless the employer had reason to anticipate that injury would result if the two continued to work together. (Emphasis added.)¹⁷

Although Kansas recognizes an exception for an assault that arises from a dispute over the conditions or incidents of employment, it does not appear that Mr. Kosac's actions were related to work. Similarly, if Mr. Kosac hit claimant in jest, the resulting injury is likewise noncompensable.

An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee, or whether the employee takes no part in it.¹⁸

Again, as we said in *Coleman*, although the Board acknowledges that the Kansas law governing horseplay is the minority view among the states, where the injured worker is not a willing participant in the horseplay, the Board is bound to follow precedent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated September 14, 2005, is affirmed.

¹⁴ See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 375, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 437-39, 179 Pac. 372 (1919).

¹⁵ *Coleman v. Armour Swift Eckrich*, No. 1,007,851, 2005 WL 831914 (Kan. WCAB Mar. 31, 2005).

¹⁶ *Supra* note 9.

¹⁷ *Supra* note 9 at 810, quoting *Hallett v. McDowell & Sons*, 186 Kan. 813, 817, 352 P.2d 946 (1960).

¹⁸ *Stuart v. Kansas City*, 102 Kan. 307, 310, 171 Pac. 913 (1918).

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
William G. Belden Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director